1986

# State of Utah v. Michelle Davis Pursifull : Brief of Appellant

Utah Court of Appeals


David L. Wilkinson; Attorney General; Attorney for Respondent.
Phil L. Hansen; Attorney for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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| THE STATE OF UTAH, | : | |
| Respondent, | : | Case No. 860259-CA |
| -v- | : | Category No. 2 |
| MICHELLE DAVIS PURSIFULL, | : | |
| Appellant. | : | |

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# BRIEF OF APPELLANT

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Appeal from the Judgment of the
Third Judicial District Court of
Salt Lake County, State of Utah,
Honorable Judith M. Billings, Judge.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the seriousness of the offense under investigation itself create exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search where the State fails to establish an emergency threatening life or limb?

## STATEMENT OF THE CASE

### NATURE OF THE CASE

This is an unlawful possession of a controlled substance with intent to distribute for value case, involving a search of a residential premises which uncovered incriminating evidence.

### COURSE OF PROCEEDINGS

The appellant's Motion to Suppress the seizure of certain evidence, specifically, bales of marijuana and drug paraphenalia, came before the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, Judge Judith M. Billings, presiding, on the 4th day of August, 1986.

On the 26th day of August, 1986, the appellant was found guilty by jury verdict of the offense of unlawful possession of a controlled substance with intent to distribute for value.

### DISPOSITION IN LOWER COURT

On the 3rd day of October, 1986, the appellant was sentenced by the Honorable Judith M. Billings to serve a term of 0 to 5 years in the Utah State Prison, with said sentence to be stayed and the appellant to be placed on probation and serve 30 days in the Salt Lake County Jail.

## STATEMENT OF THE RELEVANT FACTS FOR REVIEW

At approximately 7:30 a.m. on April 14, 1986, at 2049 Atkin Avenue, Salt Lake County, State of Utah, a residence shared by the appellant, her minor child, and her male companion, Terry L. Bakker, there was loud knocking on the front door. It awakened the appellant and Mr. Bakker went to investigate.

The appellant remained in bed a few seconds until she heard a crash and the screen door slam. She stood up on the bed and looked out the front window. She saw a male person running down the street, but she could not see Mr. Bakker. She got up, put her clothes on, and went to the front room, where Mr. Bakker was standing. He stated, "Somebody shot me, Babe."

Mr. Bakker showed the defendant where he had been shot. He looked down to his chest and fell into a rocking chair. He told her to call the police. She went to the bedroom and called 911. She returned to the front room. Mr. Bakker was not there. She went outside the house and looked down the street. She saw no one, except Mr. Bakker, who was lying underneath his truck. She took him from underneath his truck and held him to her. She heard sirens coming up the street, so she laid him down and flagged the police down. She went back and picked him up.

The police arrived and took her into the house. She called her sister at approximately 7:45 a.m. and told her that Mr. Bakker had been shot and to hurry to her. She then stood

in the front room and watched Mr. Bakker through the front screen door until her sister arrived at approximately 8:10 a.m.

At that time, the appellant's sister noticed the ambulance was approaching the scene, and there was yellow police tape around the house. The police were taking pictures and were hauling things out of the house. The police did not leave an inventory list with the appellant, nor at the residence.

One policeman took the appellant and her sister to the backyard.

The media arrived at approximately 8:30 a.m. and questioned the policeman in charge. The media left, and one of them returned at approximately 9:00 a.m. He stated, "I got down to the station, and they asked if I got pictures of them bringing marijuana out of the house." The sheriff said, "no comment."

While the appellant's sister was talking to the policemen, one of them said Mr. Bakker had been involved with the police and drugs for years, and that they had found 3 bales of marijuana in the "basement." She asked why they were not taking that outside the house as they had the other marijuana. The policeman said they were waiting for a search warrant to arrive at the scene.

The appellant's sister left the scene to take her mother to work. When she returned at approximately 11:30 a.m., the police had the search warrant.

The police removed that marijuana from the house at

approximately 1:00 p.m. They removed the yellow tape from around the house and left at approximately between 2:00 p.m. and 2:15 p.m.

SUMMARY OF THE ARGUMENT OF THE CASE

The evidence from the warrantless search and seizure should have been suppressed; and without such evidence, there was insufficient evidence to convict the defendant.

Therefore, the case should have been dismissed at trial.

ARGUMENT

THE SERIOUSNESS OF THE OFFENSE UNDER INVESTIGATION DOES NOT ITSELF CREATE EXIGENT CIRCUMSTANCES OF THE KIND THAT UNDER THE FOURTH AMENDMENT JUSTIFY A WARRANTLESS SEARCH WHERE THE STATE FAILS TO ESTABLISH AN EMERGENCY THREATENING LIFE OR LIMB.

This appeal is based upon the claim that the warrantless search in the instant case was constitutionally unjustified. The State contends that the motion was properly denied in its entirety on the ground that since the house was a "murder scene," the search was wholly permissible. In so arguing, the State is only partly correct. Issues of the propriety of the search of a "murder scene" and the extent to which such a search may be upheld are controlled by the United States Supreme Court's decision in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The Mincey decision rejected the notion of a blanket so-called "murder scene exception" to the warrantless requirements

of the Fourth Amendment. Instead, the court held that the well-accepted "exigency" doctrine, along with its limitations, were applicable to such a situation. There at 437 U.S. 392-393, S.Ct. 2413-2414, 57 L.Ed. 2d 299-300, the court held:

> The State's second argument in support of Arizona's catigorical exception to the warrant requirement is that a possible homicide presents an emergency situation demanding immediate action. We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon a scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. Cf. Michigan v. Tyler, supra, 436 U.S. [499], at 510, 98 S.Ct. [1942], at 1950-1951 [56 L.Ed. 2d 486.] 'The need to protect or preserve life or avoid serious injury is justification for what would otherwase be illegal absent an exigency or emergency.' Wayne v. United States, 115 U.S. App.D.C. 234, 241, 318 F.2d 205, 212 (opinion of Berger, J.) And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. Michigan v. Tyler, supra, 436 U.S. at 510, 98 S.Ct. [2022] at 2037-2038 [29 L.Ed.2d 564]. (Emphasis added.)
>
> But a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,' Terry v. Ohio, 392 U.S. [1] at 25-26, 88 S.Ct. [1868] at 1882 [20 L.Ed.2d 889] [44

> Ohio Ops.2d 383] and it simply cannot be contended that this search was justified by any emergency threatening life or limb .....(Emphasis added.)

Applying these tests, it is clear that a motion to suppress would have been properly denied in this case had the objects been in the officers' "plain view" as they entered the outside property in response to the emergency call. Further, the same conclusion could have been reached surrounding the trail of blood leading to the doorway where the deceased was shot. This was not the case, however. Here, at the time of their entrance onto the outside property, the police were informed that the killers had never entered the home, and, in fact, had fled the premises. As a result, looking throughout the home, opening doors, allegedly to find further victims or the assailant, particularly with respect to the linen closet, was not part of the "prompt ... search of the area to see if there are other victims or if a killer is still on the premises ..." deemed permissible by the court in Mincey, supra.

It is well-settled that, subject to a few narrow exceptions, searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed2d 576 (1967). Those seeking to rely on an exception to the warrant requirement have the burden of demonstrating its applicability. E.g., People v. Williams, 613 P.2d

879 (Colo. 1980).

In the instant case, there were two analytically distinct searches conducted by the police. The first was during the initial entry onto the outside property in response to the emergency call reporting the shooting of Terry L. Bakker. The second occurred when, after becoming aware of the fact the killers had fled and that the only other occupant of the house — Michelle Pursifull — was outside the structure attending to the decedent, and after securing the premises, the police conducted a more extensive search inside the house and seized several items of incriminating evidence. The basis and scope of permissible police activity at the time of the initial entry onto the property, and after the permises were secured, will be analyzed in turn.

The court may find that the initial entry onto the outside premises was gained by consent. The evidence would support this finding. The record does specify appellant placed the call to the police after Mr. Bakker was shot, and it is reasonably inferable from this that the call which summoned the police was placed with the express or implied agreement of both the appellant and Terry L. Bakker.

But, although the appellant did not expressly limit her consent to the later police presence inside her home, at no time did she make any statements or engage in any conduct which would lead the police to believe she desired an unlimited search

of her home.

Further, the police who responded to her plea for assistance would have understood from all the circumstances that the appellant desired only a limited search of her home.

The home "is accorded the full range of Fourth Amendment protection," Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), for it is quite clearly a place as to which there exists a justified expectation of privacy against unreasonable intrusion. Katz v. United States, supra. It is beyond question, therefore, that an unconsented police entry into a house constitutes a search within the meaning of Katz.

Here, there can be no doubt that the request for assistance and the conduct of appellant after the police arrived suggested her consent to the entry onto the outside premises for the purpose of getting medical assistance for Mr. Bakker. But, knowing as fact there was simply one victim, who was under a vehicle in the driveway; and knowing as fact the killer had never entered the house; and knowing as fact that the killer had fled the premises following the shooting; and knowing as fact that the appellant was outside the residence attending to the victim; the court should conclude that knowing all of the existing factual circumstances, the police could reasonably understand that the appellant had placed a limitation upon her consent for the search of her home. This is prticularly true in light of the fact she never gave consent for the police

to actually enter her residence, nor was she ever told of the extensive search proposed by the police — without even an opportunity to object.

The court should conclude that knowing all of the existing factual circumstances, the police who responded to her plea for assistance could reasonably understand that appellant placed a limitation upon her consent for the search of the outside premises. See People v. Annerino, 97 Ill. App.3d 240, 52 Ill. Dec. 714, 422 N.E.2d 923 (1981) (defendant's consent to have deceased removed from his kitchen not consent to enter crawl space to retrieve bullet); State v. Young, 135 Ariz. 437, 661 P.2d 1138 (App. 1982) (bartender is calling police to bar where shooting occurred, had not thereby consented to a wholesale search of the premises, including removal of ceiling tiles to find gun); State v. Jolley, 68 N.C. App. 33, 314 S.E.2d 134 (1984) (defendant's summoning of police after she shot her husband was consent "to come into the house to aid the victim" and thus did not justify 6-hour search of home thereafter).

Moreover, these facts, combined with the fact the residence was surrounded and secured by police officers, in the words of Mincey, "can hardly be rationalized in terms of the legitimate concerns that justify an emergency search."

Here, under the Mincey standard that a warrantless

search must be strictly circumscribed by the exigencies which justify its initiation, the facts simply fail to establish that the search of the linen closet was justified by any emergency threatening life or limb.

After having received details of the shooting during the emergency call, and once upon the outside prmeises, the police were in a position to observe the body and to conclude that death occurred by violent means. The police were also in a position to observe that a trail of blood led to the doorway of the house in question, and allowed them to conclude not only that the deceased had been shot in that doorway, but had subsequently staggered out to the driveway. Anything the police saw in plain view on the outside premises, or in the doorway that might provide evidence of how the death occurred was subject to seizure, and testimony concerning that evidence should not be suppressed.

But, to the extent that the police search activities at the time of entry into the dwelling went beyond discovery of items located in plain view, they must be supportable by the doctrine of exigent circumstances.

## CONCLUSION

In an appropriate case, a prompt and limited warrantless search of a homicide scene may be necessary to determine if there are other victims or if the perpetrator of the crime is

still on the premises but undetected. Mincey v. Arizona, supra. It must be remembered, however, that a warrantless search is strictly circumscribed by the exigency which creates its justification. In no case may a specific emergency be used to justify a general exploratory search. The guiding principles are that a search based on exigent circumstances requires the presence of an immediate crisis, and the police response must be strictly limited to that action necessary to respond to the exigency. People v. Gomez, 632 P.2d 586 (Colo. 1981); McCall v. People, 623 P.2d 397 (Colo. 1981).

In the instant case, the police were notified of a single murder, that the shooting had taken place in the doorway, that the killers had never entered the home and fled the outside premises, that the deceased's body was in the driveway, and that there was no other victim. Once the house and outside premises were secured by the police, and after the appellant continued to be excluded from the house, any exigent circumstances disappeared.

In addition, having secured the premises, there was no further danger to the police or to others and there was no risk that relevant evidence might be destroyed. Nor can the State rely on the plain view exception to support their later search beyond the doorway since that exception requires a previous justification for the presence of the officers. People v. Franklin, 640 P.2d 226 (Colo. 1982). Absent a warrant, the subsequent search was permissible only if the police obtained consent to

this condurct. No such consent was given.

At the court in Lara v. State, 464 So.2d 1173 (Fla. 1985) states:

> We find that the exigent circumstance exception applies when police are called to the scene of a homicide and that it allows an immediate warrantless search of the area to determine the number and condition of the victims or survivors, to see if the killer is still on the premises, and to preserve the crime scene. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 2d 290 (1978); Zeigler v. State, 402 So. 2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982). Id., at 1177-1178.

No such exigent circumstances existed in the instant case.

Therefore, the evidence obtained by the unreasonable search of residence should have been supressed and the case dismissed because of insufficient evidence.

There was no evidence that the defendant dealt in drugs nor even that she knew the drugs were in the house. She was convicted solely on the grounds that she was living in the residence.

This case should be reversed; or, at least in the alternati remanded for a new trial.

REQUEST FOR ORAL ARQUMENT

Appellant requests oral argument under Category No. 2 of the new order ot his court filed January 8, 1986. (Priority of Cases Scheduled for Oral Argument, 25 Utah Adv. Rep 4.)

Respectfully submitted this 19th day of May, 1987.

PHIL L. HANSEN
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Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 1987, four (4) copies of Brief of Appellant were served on the office of the Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, addressed to the attention of Sandra Sjogren, Assistant Utah Attorney General.

# ADDENDUM

## NOTICE OF APPEAL

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff, | : | NOTICE OF APPEAL |
| -v- | : | Case No. CR-86-754 |
| MICHELE DAVIS PURSIFULL, | : | |
| Defendant. | : | |

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Notice is hereby given that the above-named defendant hereby appeals to the Supreme Court of the State of Utah from the judgment and sentence rendered against her on the 3rd day of October, 1986, by the Honorable Judith M. Billings.

DATED this 22nd day of October, 1986.

Phil L. Hansen

PHIL L. HANSEN
Attorney for Defendant

Certificate of Service

I hereby certify that a copy of the foregoing was served this 22nd day of October, 1986, on the Office of the Salt Lake County Attorney, 231 E. 400 So., Salt Lake City, Utah 84111, addressed to the attention of Rodwicke Ybarra, Deputy County Attorney.

Marsha A. Metcalf